Mohd Nor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut

HIGH COURT (KUALA TERENGGANU) — CIVIL SUIT NO 22-9-1998
ABDULL HAMID EMBONG J
20 MARCH 2001

Legal Profession *— Duty of care — Retainer — Standard of care to be observed — Test of 'a reasonably competent advocate and solicitor acting within the confines of the retainer' — Whether defendant had failed to inform the plaintiff of the hearing date — Whether defendant has legal obligation to inform plaintiff of hearing date — Whether defendant has exercised reasonable care, skill and diligence in acting as advocate and solicitor for the plaintiff — Defence of limited immunity — Whether available*

The plaintiff is claiming for general and special damages against the defendant for professional negligence. The defendant is a firm of advocates and solicitors retained by the plaintiff to defend the plaintiff's suit filed at the High Court, Temerloh ('the Temerloh suit'). In that suit the plaintiff was held to be liable and ordered to pay a sum of RM 580,788.59. In the instant suit, the plaintiff alleged that the defendant, as its retained advocate and solicitor, was negligent in exercising due care, skill and diligence in defending the Temerloh suit. The plaintiff's allegation of negligence is ground on both acts preparatory to the trial and the omission of the defendant in court failing to call witness and adducing documents as evidence in defending the Temerloh suit. The issues to be decided are: (i) whether the defendant had informed the plaintiff of the new hearing date of the Temerloh suit; (ii) whether the defendant had been negligent in reminding the plaintiff of the hearing date; (iii) whether the defendant had been negligent in its preparation of a reasonable defence in the Temerloh suit by failing to file the relevant documents or to produce the plaintiff's witnesses at trial.

Held, allowing the appeal with costs:

(1) The first two issues are inter-related and the court's finding for the defendant is based on the evaluation of the facts as can be discerned from the testimonies of both the defendant and the plaintiff. In coming to this finding, the court is guided by the law as provided under s 101 of the Evidence Act 1959, requiring the plaintiff to prove the alleged facts. The evidence of the defendant in the final analysis remains unchalleged save for the denial of the plaintiff which the court finds to have not been proven on a balance of probabilities (see p 568D–E).

(2) It is also the finding of the court that the failure of the plaintiff to produce the said clerk who is said to have informed the plaintiff to note down the hearing date, must be held to his detriment and that piece of missing material evidence be presumed to be against him pursuant to s 114(g) of the Evidence Act 1950. Similarly, an adverse inference is also raised against the plaintiff

for its failure to produce the two persons who can be inferred to have been informed by the defendant of the adjourned date (see p 568H–I).

(3) It may be a common practice for an advocate and solicitor to remind a client or his witness to be present in court on a appointed date, but there is no legal obligation to do so. Failure to remind a client to attend court is therefore not a negligent act if, as in the instant case, the advocate and solicitor had taken all necessary and reasonable steps to inform the client. Neither the Legal Profession Act 1976 nor the rules made thereunder provide for such specific obligation, even though in all cases there is, as a matter of etiquette, a need for an advocate and solicitor, to always uphold the interest of his client, which in a particular case would include ensuring the latter's appearance in court (see p 569C–E).

(4) It is settled law that a client may bring an action against an advocate and solicitor in contract, based on the retainer. The standard of care required is that of a reasonable competent advocate and solicitor acting within the confines of the retainer; *Neogh Soo Oh & Ors v G Rethinasamy* [1984] MLJ 126 followed. On the facts of the case, the court is the view that the defendant had reasonably done all it could in preparing for the plaintiff's defence in the Temerloh's suit. The court could not find that the defendant had failed to exercise reasonable care, skill and diligence in acting as advocate and solicitor for the plaintiff in the Temerloh's suit (see p 570A-C).

(5) On the instant case, the court is of the view that the defence of limited immunity is applicable to the defendant and on the facts, the court found that the acts complained of as purportedly giving rise to negligence are acts preparatory to and so intimately connected and akin to the actual conduct of the case in the Temerloh suit. The court also wish to add in qualification, that the defence of immunity succeeded here in view of the particular background as founded on the evidence adduced before this court. The court maintains the view that an advocate and solicitor who holds himself as possessing reasonable competence in his vocation owes a duty to his client to exercise that duty with reasonable care and competence. Events may turn out to prove that an advocate and solicitor had been wrong in making a decision but this does not mean that he had been negligent. His is only a duty to exercise reasonable care and competence, there is no duty to be right (see pp 576E–F, I–577B).

[Bahasa Malaysia summary

Plaintif menuntut gantirugi umum dan khas daripada defendan atas sebab kecuaian profesional. Defendan merupakan satu firma peguambela dan peguamcara yang berkhidmat untuk plaintif bagi

membela guaman plaintif yang difailkan di Mahkamah Tinggi Temerloh ('guaman Temerloh tersebut'). Dalam guaman tersebut, plaintif diputuskan bertanggungjawab dan diperintahkan membayar jumlah RM 580,788.59. Dalam guaman asal, plaintif mendakwa bahawa defendan, yang diambil khidmat sebagai peguambela dan peguamcaranya, cuai dalam menjalankan tugasnya secara berhati-hati, berkebolehan dan tekun ketika membela guaman Temerloh tersebut. Dakwaan kecuaian plaintif berasaskan tindakan persediaan kepada perbicaraan tersebut dan ketinggalan defendan di mahkamah kerana gagal memanggil saksi dan mengemukakan dokumen sebagai keterangan dalam membela guaman Temerloh tersebut. Perkara-perkara untuk diputuskan ialah: (i) sama ada defendan telah memberitahu plaintif mengenai tarikh perbicaraan baru guaman Temerloh tersebut; (ii) sama ada defendan telah cuai dalam mengingatkan plaintif mengenai tarikh perbicaraan; (iii) sama ada defendan cuai dalam menyediakan satu pembelaan yang munasabah bagi guaman Temerloh tersebut kerana gagal memfailkan dokumen-dokumen yang relevan atau memanggil saksi-saksi plaintif semasa perbicaraan.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Dua perkara pertama saling berhubung-kait dan keputusan mahkamah menyokong defendan adalah berdasarkan penilaian fakta-fakta yang diperolehi dari pengakuan defendan dan plaintif. Dalam mencapai keputusan ini, mahkamah dibimbing undang-undang di bawah s 101 Akta Keterangan 1959 yang memerlukan plaintif membuktikan fakta-fakta yang didakwa. Keterangan defendan dalam analisa terakhir kekal tidak dipersoalkan kecuali penafian plaintif, yang didapati mahkamah sebagai tidak dibuktikan pada imbangan kebarangkalian (lihat ms 568D–E).

(2) Ia juga merupakan keputusan mahkamah bahawa kegagalan plaintif memanggil kerani yang dikatakan memberitahu plaintif agar mencatatkan tarikh perbicaraan mesti diputuskan menentang plaintif dan bahawa keterangan material yang hilang itu mestilah dianggap menentang plaintif menurut s 114 (g) Akta Keterangan. Inferensi yang bertentangan juga dikemukakan terhadap plaintif kerana kegagalannya memanggil dua orang yang dapat disimpulkan telah diberitahu oleh defendan mengenai tarikh yang telah ditangguhkan (lihat ms 568H–I).

(3) Ia mungkin perkara biasa bagi seorang peguambela dan peguamcara mengingatkan anak guam atau saksinya supaya hadir di mahkamah pada satu tarikh yang ditetapkan, tetapi beliau tiada obligasi di sisi undang-undang untuk berbuat demikian. Kegagalan mengingatkan anak guam untuk hadir di mahkamah bukanlah satu tindakan yang cuai jika, dalam kes asal,

peguambela dan peguamcara tersebut telah mengambil semua langkah yang perlu dan munasabah untuk memberitahu anak guam tersebut. Baik Akta Profesyen Guaman 1976 mahupun peraturan-peraturan yang dibuat di bawahnya tidak memperuntukkan obligasi khas sedemikian, walaupun dalam semua kes terdapat keperluan dari segi etiket bagi seorang peguambela dan peguamcara mempertahankan kepentingan anak guamnya, dan dalam kes yang khusus ini merangkumi memastikan kehadiran anak guam di mahkamah (lihat ms 569C–E).

(4) Di bawah undang-undang, anak guam boleh memulakan tindakan terhadap seorang peguambela dan peguamcara di bawah kontrak, berdasarkan retainer. Piawai berjaga-jaga yang diperlukan ialah piawai peguambela dan peguamcara yang berkebolehan munasabah yang bertindak menurut retainer tersebut; *Neogh Soo Oh & Ors v G Rethinasamy* [1984] MLJ 126 diikut. Berdasarkan fakta-fakta kes ini, mahkamah berpandangan bahawa defendan telah mengambil semua langkah yang munasabah sebagai persediaan pembelaan plaintif dalam guaman Temerloh tersebut. Mahkamah tidak mencapai keputusan bahawa defendan gagal bertindak secara munasabah dan berjaga-jaga, berkebolehan dan tekun ketika berperanan sebagai peguambela dan peguamcara plaintif dalam guamPeristiwa selanjutnya mungkin menunjukkan bahawa seorangan Temerloh tersebut (lihat ms 570A–C).

(5) Dalam kes asal, mahkamah berpandangan bahawa alasan pembelaan kekebalan terhad boleh dipakai oleh defendan dan memandangkan fakta-fakta hal keadaan, mahkamah mendapati bahawa tindakan-tindakan yang diadui menunjukkan kecuaian merupakan tindakan-tindakan persediaan awal yang berkait rapat dengan pengendalian sebenar kes tersebut dalam guaman Temerloh. Mahkamah juga ingin menambah, sebagai pembatasan, bahawa pembelaan kekebalan berjaya dihujahkan dalam kes ini disebabkan latarbelakang khususnya dan keterangan yang dikemukakan di hadapan mahkamah. Mahkamah mempertahankan pandangan bahawa seorang peguambela dan peguamcara yang menganggap dirinya memiliki kebolehan yang munasabah dalam peranannya bertanggungjawab terhadap anak guamnya untuk melaksanakan kewajipannya dengan penjagaan dan kebolehan yang munasabah. Peristiwa selanjutnya mungkin menunjukkan bahawa seorang peguambela dan peguamcara telah tersilap dalam membuat keputusannya tetapi ini tidak bermaksud bahawa beliau cuai. Tanggungjawab beliau hanyalah untuk bertindak dengan penjagaan dan kebolehan yang munasabah, terdapat tiada tanggungjawab untuk bertindak dengan tepat (lihat ms 576E–F, I–577B).]

Notes

For cases on duty of care of advocate and solicitor, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1429–1444.

Cases referred to

Anthony Ratos v City Specialist [1996] 3 CLJ 415 (refd)
Ho Kok Thin v Registrar of the High Court [1989] 3 MLJ 181 (refd)
Kelley v Corston [1998] 3 WLR 246 (refd)
Miranda v Khoo Yew Boon [1968] 1 MLJ 161 (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] MLJ 126 (folld)
Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi [1997] 2 MLJ 118 (refd)
Rees v Sinclair (1974) NZLR 180 (refd)
Rondel v Worsley [1967] 1 QB 443 (distd)
Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Others [1980] AC 198 (refd)
Wong Cheong Kai & Ors v Hong Kong & Shanghai Bank & Anor [1996] 4 CLJ 114 (refd)

Legislation referred to

Court of Judicature Act 1964, s 14(2)
Evidence Act1959, ss 101, 114(g)
Legal Profession Act 1976

S Thilaga (Hisham, Sobri & Kadir) for the plaintiff.
T Sagadavan (Shearn Delamore & Co) for the defendant.

Abdull Hamid Embong J. : This is an appeal by the plaintiff whose claim for general and special damages against the defendant for professional negligence was dismissed with costs by this court on 11 January 2001. The defendant is a firm of advocates and solicitors retained by the plaintiff to defend the latter in a civil suit filed at the Temerloh High Court (the Temerloh suit), where the plaintiff was sued for non-payment of goods sold and delivered. In the Temerloh suit, the plaintiff (as defendant therein) was held to be liable and ordered to pay a sum of RM580,788.59.

In the instant suit, the plaintiff alleged that the defendant as its retained advocate and solicitor was negligent in not exercising due care, skill and diligence in defending it in the Temerloh suit. The particulars of negligence as found in the plaintiff's statement of claim herewith reproduced for easy reference:

> 8(a) Pada 2 September 1997, defendan telah memberitahu saksi plaintif yang menghadiri mahkamah secara lisan bahawa perbicaraan tindakan tersebut yang ditetapkan pada 2 September 1997 telah ditangguhkan kepada 18 Oktober 1997.
>
> (b) Defendan telah gagal memaklumkan plaintif bahawa perbicaraan tindakan tersebut sebenarnya ditetapkan pada 8 Oktober 1997 dan telah

gagal memastikan bahawa plaintif mempunyai notis mengenai perbicaraan tersebut.

(c) Defendan gagal untuk dan/atau cuai dalam membuat persediaan yang lengkap atau munasabah bagi membela plaintif dalam perbicaraan tindakan tersebut dengan —

(i) gagal memfailkan sebarang keterangan dokumen di Mahkamah berhubung dengan dan bagi membuktikan pembelaan defendan; dan

(ii) gagal memanggil saksi-saksi plaintif sebelum 8 Oktober 1997 untuk memberi taklimat bagi perbicaraan dan telah menafikan plaintif peluang untuk mendapat notis mengenai perbicaraan pada 8 Oktober 1997.

(d) Defendan, tanpa mengambil arahan plaintif dan tanpa memberi notis kepada plaintif, telah, menerusi surat bertarikh 7 Oktober 1997 memohon kepada Mahkamah untuk penangguhan perbicaraan tindakan tersebut yang ditetapkan pada 8 Oktober 1997.

(e) Akibat permohonan defendan untuk penangguhan ditolak oleh Mahkamah menerusi surat bertarikh 7 Oktober 1997, defendan telah menghadiri perbicaraan pada 8 Oktober 1997 tanpa menghubungi dan memberi notis kepada plaintif dan/atau saksi-saksinya.

(f) Defendan telah meneruskan dengan pengendalian perbicaraan pada 8 Oktober 1997 tanpa mengemukakan sebarang keterangan untuk membela tuntutan tersebut dan dengan pengetahuan penuh bahawa tindakannya akan mengakibatkan kerugian yang tidak boleh dibaikpulih kepada plaintif.

(Akibat kecuaian dan/atau kegagalan defendan seperti yang dinyatakan di atas, penghakiman untuk jumlah RM580,788.59, faedah serta kos telah dimasukkan terhadap plaintif di hujung perbicaraan pada 8 Oktober 1997 (selepas ini dirujuk sebagai 'hutang penghakiman tersebut').

Akibat kecuaian defendan juga, plaintif telah kehilangan segala prospek untuk membela tindakan tersebut, telah kehilangan peluang untuk menang dalam rayuan kerana tiada keterangan dikemukakan di peringkat awal dan terpaksa menanggung hutang penghakiman tersebut dan dengan itu mengalami kerugian.)

In other words, the allegation of negligence is grounded on both acts preparatory to the trial and the omission of the defendant in court in failing to call witnesses and adduce documents as evidence in defending the Temerloh suit.

The plaintiff, through the testimony of its former director (SP2, Mohd Noor bin Dagang), stated that one Yusuf Endut (since deceased) of the defendant's firm had two discussions with him in respect of the preparation of the plaintiff's defence in the Temerloh suit. During the first meeting with the late Yusuf Endut, SP2 had handed over to him some documents including the writ of summons in respect of the Temerloh suit. Yusuf Endut agreed to act for the plaintiff in the Temerloh suit. When Yusuf Endut passed away, the matter was taken over by Puan Norizai Mohamed (SD1). On 30 July 1997, the defendant, by letter, asked the plaintiff to attend the hearing of the Temerloh suit at the Temerloh High Court on 2 September

1997. The defendant also requested the plaintiff to meet up with the attending counsel (SD1) before the trial date, which SP2 did. SP2 said that he had attended at the High Court in Temerloh on 2 September 1997 with another person and was verbally informed by SD1 that the Temerloh suit was postponed to 18 October 1997. SP2 then returned to his office in Kuala Terengganu. He then asked his clerk to note the new hearing date on his office notice board. SP2 himself did not note down this new date anywhere. When it was put to him during cross-examination that SD1 had told him that the new hearing date was actually 8 October 1997, SP2 denied it. SP2 however agreed that at the Temerloh High Court when the new hearing date was told to him, he had not noted it down. On 9 October 1997, SP2 received a call from SD1 who told him that the claim in the Temerloh suit was allowed. On 13 October 1997, the plaintiff terminated the service of the defendant.

SD1, in her evidence, stated that the adjourned hearing date of the Temerloh suit was fixed for 8 October 1997, not 18 October 1997 as alleged by SP2. On 2 September 1997, SD1 was present at the Temerloh High Court and was informed that the judge was on medical leave. A new date, 8 October 1997 was fixed for trial. She then met up with SP2, one Mohd Thani, and another person (witnesses for the plaintiff in the Temerloh suit) and verbally informed them together of the new date. She also promised the SP2 that she would write him and inform him of the new trial date. SD1 said she knew Mohd Thani because the latter had, on 14 August 1997, together with SP2 and SP1 (the secretary of the plaintiff) visited her office in Kuala Terengganu to discuss the Temerloh suit. That was the first occasion she had met with Mohd Thani. On 4 September 1997, the defendant wrote to the plaintiff, informing the latter of the new hearing date viz 8 October 1997 of the Temerloh suit. A copy of the said letter was produced by SD1 and marked as exh D1. The plaintiff did not contact SD1 after this.

On 7 October 1997, SD1 fell ill and was given medical leave for two days, ie on 7 October 1997 and 8 October 1997. SD1 promptly wrote to the Temerloh High Court requesting for a postponement of the Temerloh suit fixed for 8 October 1997, on the ground of her illness (see exh P7 and P8). That request was turned down (exh P12). SD1 attended court on 8 October 1997 and the trial proceeded in the absence of SP2, who had not been informed by SD1 of the latter's request for a postponement. When it was put to her that she was obliged to inform SP2 to attend court on 8 October 1997, SD1 denied that she was under such an obligation. SD1 explained that she had also not informed SP2 of her request for a postponement of the Temerloh suit because it was made only one day before the trial date and that she would only inform SP2 if the request were granted by the court.

On 8 October 1997, when the hearing of the Temerloh suit proceeded, neither SP2 nor any witnesses for the plaintiff attended court. SD1 stated in her evidence that at the close of the Temerloh suit's plaintiff's (Eng Soon Hardware) case she made another attempt to have the proceeding adjourned to another date for its continued hearing, but was not successful.

The notes of proceedings (IDP 3), however, do not show that such an application was made to the court. What was recorded was that SD1 informed the court that the defendant (the plaintiff in this instant suit) was absent and that the defendant was unable to give any evidence. SD1 also stated in her testimony that she had applied for another date to submit but that, too, was refused. Again, the notes of proceedings do not reflect these assertions by SD1. In this situation, this court must hold these bare assertions by SD1 as a fact not proven and that little weight should be attached to this part of her evidence. This is not to say that SD1's evidence is totally rejected, as I had had the opportunity to observe her demeanor and had found SD1 to be a truthful witness.

The central issues to be decided by this court are:

i) whether the defendant (through SD1) had informed the plaintiff of the new hearing date of the Temerloh suit;

ii) whether SD1 had been negligent in not reminding SP2 of the hearing date;

iii) whether the defendant had been negligent in its preparation of a reasonable defence in the Temerloh suit by failing to file the relevant documents or to produce the plaintiff's witnesses at the trial.

The first two issues are inter-related and this court's finding for the defendant is based on the evaluation of the facts as can be discerned from the testimonies of both SP2 and SD1. Although there are two conflicting versions of this issue, it is this court's finding that SD1's version is more believable. In coming to this finding, this court is guided by the law as provided under s 101 of the Evidence Act 1950 ('the Act'), requiring the plaintiff to prove the alleged facts. The evidence of SD1 in the final analysis remains unchallenged save for the denial of SP2, which this court finds to have not been proven on a balance of probabilities. SD1 had unequivocally stated that she had met up with SP2 and two other persons at the Temerloh High Court on 2 September 1997. One of them was Mohd Thani whom SD1 had met on an earlier occasion in her office, on 14 August 1997. In my view, SD1 could not have been mistaken on the identity of this person whom she had met a mere two weeks before. This court also accepted SD1's evidence when she said that she had informed SP2 of the next hearing date, ie 8 September 1997, in the presence of the other two persons with him. SP2 had admitted that he did not jot down this date anywhere at that moment but had informed his clerk to note down the date (as 18 September 1997) on his office notice board. This assertion, if at all true, was however not proven. It would indeed be in the plaintiff's interest to produce the clerk who noted that date. In view of this material contradiction with the defence's version of the story, it is the finding of this court that the plaintiff's failure to produce the said clerk must be held to his detriment and that the piece of missing material evidence be presumed to be against him pursuant to s 114(g) of the Act. Similarly, an adverse inference is also raised against the plaintiff for SP2's failure to produce the two persons who can be inferred to have been informed by SD1 of the adjourned date. The plaintiff had ample notice of this issue which had been pleaded in the statement of

defence. On the contrary, SD1 had testified that she had promised to give SP2 a notice in writing of the new hearing date. This she duly did as evidenced by her letter dated 4 September 1997 (exh D1). SP2 had denied receiving D1, but short of proof to the contrary, I find that D1 had been sent to the plaintiff. The same address of the plaintiff was used in D1 as in a previous communication from the defendant (see P6, a previous letter dated 30 July 97 also sent by ordinary post, where the defendant had informed the plaintiff of the first hearing date). On the evidence, it is my finding that SP2 had made a mistake on the adjourned hearing date, and rejected his evidence. Human memory can sometimes be frail, more so on a matter of dates. SD1's version is thus found to be more plausible as supported by the evidence and, on a balance of probabilities, acceptable to this court.

This court is also of the view that having informed SP2 verbally and by a subsequent letter, SD1 need no longer remind the plaintiff of the next hearing date. It may be a common practice for an advocate and solicitor to remind a client or his witnesses to be present in court on an appointed date, but my view is that, there is no legal obligation to do so. Failure to remind a client to attend court is therefore not a negligent act if, as in the instant case, the advocate and solicitor had taken all the necessary and reasonable steps to inform the client. Neither the Legal Profession Act 1976 nor the rules made thereunder provide for such a specific obligation, even though in all cases, there is, as matter of etiquette, a need for an advocate and solicitor to always uphold the interest of his client, which in a particular case, would include ensuring the latter's appearance in the court.

Next is the issue on whether the defendant had been in breach of its duty to exercise reasonable care and skill in its preparation of the plaintiff's defence in the Temerloh suit. It was the plaintiff's case that the defendant had failed to adduce any documentary evidence at the trial and had also failed to arrange for the appearance of any witnesses, resulting in the Temerloh High Court's finding against the plaintiff. SP2 had alleged in his evidence that he had handed over some documents (exh P4) to SD1 which were relevant to the plaintiff's defence in the Temerloh suit. He also said that on the occasion of his second meeting with SD1, when asked whether the latter required any witnesses for the trial, SD1 had told him that she would inform him later. SD1, in her evidence, testified that a statement of defence (exh D4) had been filed for the plaintiff based on the only document she had received from the plaintiff (P4), which is an award of the contract by the Jabatan Kerja Raya to SP2 for the maintenance of certain schools in Kemaman, Terengganu. SD1 had also asked for other documents from the plaintiff but the latter failed to supply her with any. The plaintiff's defence in the Temerloh suit was that it had no knowledge of and had not received the goods alledgedly supplied by Eng Soon Hardware. As such, the testimonies of witnesses would have been most crucial to advance and support the defence case. The absence of any witnesses at the trial of the Temerloh suit was therefore fatal to the plaintiff. That, coupled with the absence of any documentary evidence, became a

bane to the plaintiff's cause when SD1 presented the defence without the assistance of SP2 or any witnesses. In my view the defendant here had reasonably done all it could in preparing for the plaintiff's defence in the Temerloh suit. On the evidence, this court could not find that SD1 had failed to exercise reasonable care, skill and diligence in her action as an advocate and solicitor acting for the plaintiff in the Temerloh suit.

The defence of immunity

It is settled law that a client may bring an action against an advocate and solicitor in contract, based on the retainer (see *Neogh Soo Oh & Ors v G. Rethinasamy* [1984] 1 MLJ 126). The standard of care required is that of a reasonably competent advocate and solicitor acting within the confines of the retainer. In the case of *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161, the then Federal Court pronounced that the position of an advocate and solicitor in a fused profession found in Malaysia is the same as that of a solicitor in England and if there is an act of negligence, it is immaterial to consider whether the act is one normally done in England by a barrister or a solicitor. It was also held therein that the advocate and solicitor is under a contractual duty to use care and this extends to the conduct of the case. In *Miranda*'s case, one of the questions posed was whether an advocate, be he a barrister or solicitor, who appears in court for a client should, on the ground of public policy, be protected from suits brought by disgruntled litigants. The Federal Court, in distinguishing the position of a barrister in England who is accorded such an immunity pursuant to the House of Lords' decision in *Rondel v Worsley* [1967] 1 QB 443, held that the position of an advocate and solicitor here is exactly that of a solicitor in England, ie he may be sued for negligence in contract. The Federal Court, however, did not address the aspect of immunity on public policy ground. In an article entitled 'The liability of an advocate and solicitor for negligence in the course of his professional duty' [1968] 2 MLJ xvi, Mr G Starforth Hill (an advocate and solicitor), based on *Rondel*'s case, puts forth the following propositions as regards the immunity of an advocate and solicitor practising under our fused profession:

> (4) On the authority of the House of Lords' judgments in *Rondel*'s case, the following propositions which are relevant to the circumstances of a fused profession emerge:
>
> 1 neither a solicitor nor a barrister, when acting as an advocate, is liable for alleged negligence while so acting; and
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> 2 a solicitor, when not acting as an advocate, and a barrister, when engaged in advisory work, are liable for alleged negligence and these propositions are based on considerations of public policy only and are independent of
>
> (a) the relationship, whether contractual or otherwise, between a barrister or a solicitor and his client; and
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> (b) the right of a barrister or a solicitor to reject a client.
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> It would appear that the House of Lords has held that both barristers and solicitors are subject to the ordinary provisions of the law relating to liability for negligence in the same way as any other

> professional men subject only to the limitations on that liability made necessary by reasons of public policy.

On this issue, the plaintiff took the stand that it is a misconception that the defendant enjoys absolute immunity as submitted by the defence counsel. The defence, in asking that such immunity be conferred to it, had referred to the House of Lords' decision in *Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Ors* [1980] AC 198. In that case, a barrister was, at first instance, found to be liable in negligence in not properly advising the solicitors handling the brief to amend the pleadings of the plaintiff for whom the solicitors were acting. On appeal, the Court of Appeal held that the advice tendered fell within the ambit of the immunity from an action for negligence granted to a barrister in respect of his conduct and management of a cause in court. On further appeal, the House of Lords held, by a majority (two Law Lords dissenting):

i) that a barrister's immunity from suit for negligence in respect of his conduct of litigation on the ground of public policy was an exception and applied only in the area to which it extended,

ii) that the immunity was not confined to what was done in court but included some pre-trial work but that the protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice and each piece of pre-trial work had to be tested against the one rule, namely, that the protection existed only where the particular work was so intimately connected with the conduct of the cause in court that it could fairly be said to be a preliminary decision affecting the way that cause was to be conducted when it came to a hearing.

iii) that the acts complained of (ie, the barrister's advice to solicitor) falls within the narrower test and outside the immunity area.

The justification for granting this limited immunity to barristers conducting court work can be found in the speech of Lord Wilberforce in *Saif Ali* which, in view of its entire relevance in arriving at my decision on this issue in the instant case, is now quoted in extenso from pp 212–216 of the report. His Lordship opined:

> *Rondel v Worsley* gave rise to a restatement of the traditional principal of barristers' immunity in the light particularly of the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Previously, an important, if not the main, reason for the immunity was supposed to lie in the fact that a barrister could not sue for his fees: this reason, if valid, would of course have thrown a blanket of immunity over all barristers' actions, in or out of court, whatever their nature. This House, however, in 1967 took the inevitable view that this reason no longer applied: liability for negligence might exist in the absence of a contract for reward. Nevertheless, the immunity was held to exist on grounds, essentially, of public policy; mainly upon the ground that a barrister owes a duty to the court as well as to his client and should not be inhibited, through fear of an action by his client, from performing it; partly upon the undesirability of relitigation as between barrister and client of what

was litigated between the client and his opponent. This necessarily involved a removal of the total blanket immunity and a restriction of it to such cases as might fall within the area of public policy.

Rondel v Worsley [1969] 1 AC 191 was concerned and only concerned with matters taking place in court which resulted in an outcome unfavourable to the client. But the speeches contain considered observations as to the extent of barristers' immunity for matters taking place outside court and in barristers' chambers. Since the case was not concerned with such matters, these observations have the status of obiter dicta. However, not all obiter dicta have the same weight, or lack of weight, in later cases. Of those then made in the House two things may be said. First, they were considered and deliberate observations after discussion of the same matters had taken place in the Court of Appeal. It may be true that the counsel in the case did not present detailed arguments as to the position outside the court room — they had not interest in doing so — but I cannot agree that this invalidates or weakens judicial pronouncements. Judges are more than mere selectors between rival views — they are entitled to and do think for themselves. Secondly, it would have been impossible for their Lordships to have dealt with the extent of barristers' immunity for acts in court without relating this to their immunity for other acts. As I shall shortly show, their Lordships attached the immunity to the conduct of litigation. But litigation takes some time to arrive in court for trial, so unless they were prepared to confine the immunity to that part of litigation which occurs in the court room, it was not only appropriate but necessary to deal with such acts — in relation to litigation — as occuring outside the courtroom. A statement of principle which stopped at the door of the court would have been truncated and irrational. These factors, in my opinion, tell in favour of giving considerably more weight to their Lordships' expressions of opinion that obiter dicta normally receive. We may clarify them, but we should hesitate before disregarding them.

This leads to another point. The general principle that barristers are entitled to some immunity was established, or re-established, by unanimous decision of all their Lordships. It was argued that barristers should enjoy no greater immunity than other professional men. But that argument was rejected: barristers, it was firmly held, have a special status, just as a trial has a special character: some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer loss. Now I would accept that the existence of a duty of care, and correspondingly of liability in negligence for failure to exercise that duty, continues in the natural course of legal duty, continues in the natural course of legal evolution to expand as new situations come before the courts. But I do not think that this natural process which bears upon the existence of a duty of care should lead up to sweep away after so short a time an immunity from suit on special grounds of principle, which after many centuries of existence has been restated by this House. No ground was suggested why we should reopen the decision in *Rondel v Worsley* [1969] 1 AC 191 and I do not think we should do so. What is required of us is a decision on the limits of an immunity held by this House to exist – a fringe decision rather than a new pattern. I will not consider the opinions.

Lord Reid considered that there was no doubt as to the position of barristers appearing in court (p 227). Then he introduced the phrase 'their work in conducting litigation' (p 231D). He made this more explicit when he said 'The same public duty applies when drawing pleadings or conducting

subsequent stages in a case as applies to counsel's conduct during the trial' and 'the same will apply at a stage when litigation is impending' (pp 231–232). It is clear from this that his Lordship was not seeking with any precision to define the limit of immunity but that his thinking was in terms of litigation - more broadly than of work in court.

Lord Morris of Borth-y-Gest's expressions were more restrictive: 'what is said or done in the ... management of a case in court' (p 247D); 'relating only to the limited field of the conduct and management of a case in court' (p 248F). But his Lordship quotes, at p 243B, from the leading case of *Swinfen v Lord Chelmsford* (1860) 5 H & N 890, 923 (a case not limited to action in court) the sentence 'no action will lie against counsel for any act honestly done in the conduct of management of the case,' and he expressed agreement with the judgment of Salmon LJ in the Court of Appeal which I think it fair to say drew the line between litigation and paper work. Lord Pearce's expressions were wider: there is no distinction 'between the liability of a barrister in litigation and in his other non-litigious work as a barrister' (p 265B). He held that a counsel in giving opinions 'not only those on which an action is to be started or not started' owes a duty to the court (p 276E). Lord Upjohn held that the immunity covers litigation 'at all events in matters pertaining to litigation' (p 218D) and that it must 'start before counsel enters the doors of the court to conduct the case' (p 285F). He continued, at pp 285–286:

> 'He will have had to give fearlessly to his client advice on the prospects of success; he will have settled the pleadings; and on discovery and in his advice on evidence and on many other matters he may have had to refuse to adopt his client's wishes. As a practical matter, I do not more than suggest that immunity of counsel in relation to litigation should start at [the] letter before action...'

Finally Lord Pearson used words of exclusion. He asked, 'Does the barrister's immunity extend to 'pure paper work,' that is to say, drafting and advisory work unconnected with litigation?' (p 293F).

My Lords, none of these expressions is precise, in the nature of things they could not be, but they show a consensus that what the immunity covers is not only litigation in court but some things which occur at an earlier stage, broadly classified as related to conduct and management of litigation. The spectrum of the opinion is a wide one: we are now concerned to narrow it.

In considering how far a barrister's immunity extends, it is necessary to disentangle three separate strands.

The first is that of privileges. This attaches to proceedings in court and protected equally the judge, counsel, witnesses, jurors and parties. It has nothing to do with a barrister's duty to his client. It is worth noting that the courts will not allow this privilege to be overflanked by basing a claim on statements made or agreed to be made out of court if these were clearly and directly made in relation to the proceedings in court: *Watson v M'Ewan* (1905) AC 480 and *Marrinan v Vibart* [1963] 1 QB 528.

The second is that of the defences available to barristers. Much if not most of a barrister's work involves exercise of judgment — it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very

unlikely to succeed. But this is not an argument for giving him total immunity from proceedings.

The third is that of immunity from an action, which depends upon public policy. In fixing its boundary, account must be taken of the counter policy that a wrong ought not to be without a remedy. Furthermore, if the principle is invoked that it is against public policy to allow issues previously tried (between the client and his adversary) to be relitigated between client and barrister, it may be relevant to ask why this principle should extend to a case in which by the barrister's (assumed) fault, the case never came to trial at all. These two considerations show that the area of immunity must be cautiously defined.

How can this be done? 'Conduct and management' is the expression which has emerged and no doubt this is not a sharp definition. I think that something more precise is required if immunity in respect of acts out of court is to be properly related to the immunity for acts in court. A helpful expansion of the phrase was suggested by McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair* (1974) NZLR 180. I quote his words, at p 187:

> 'I cannot narrow the protection to what is done in court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application that is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.'

I do not understand this formulation as suggesting an entirely new test, ie a double test requiring (a) intimate connection with the conduct of the cause in court and (b) necessity in the interests of the administration of justice. The latter words state the justification for the test but the test lies in the former words. In these words involve a narrowing of the test as compared with the more general words 'conduct and management' I think that this is right and for that reason I suggest that the passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts, whether immunity exists in any given case. I should make three observations. First, I think that the formulation takes proper account, as it should, of the fact that many trials, civil and criminal, take place only after interlocutory or pre-trial proceedings. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself: it would be illogical and unfair if they were protected in the one case but not in the other. Secondly, a decision that a barrister's liability extends so far as I have suggested necessarily involves that it does not extend beyond that point. In principle, those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area, the normal rule must apply. Thirdly, I would hold that the same immunity attaches to a solicitor acting as an advocate in court as attaches to a barrister. Fourthly, it is necessary to repeat that the rule of immunity is quite distinct from the question what defences may be available to a barrister when he is sued. It by no means follows that if an error takes place outside this immunity area, a liability in negligence arises.

> Finally, as to the present case. The question is whether the third party claim should be allowed to go to trial, or whether it should be held that it falls within the area of immunity so as to justify striking out at this stage. In the Court of Appeal Lord Denning MR and Lawton LJ held that the acts and omissions complained of came within the general words 'conduct and management of litigation.' Bridge LJ held that they came within the narrower test of *Rees v Sinclair*.
>
> My Lords, I think that the narrower test is the correct one, and I do not consider that the acts complained of come within it so as to justify striking out. An oversight, or failure to consider the consequences of not adding Mrs Sugden as a defendant before the limitation period expired, if such took place, may have been defensible, but in my opinion falls well outside the immunity area. I would allow the appeal.

The principle that can be extracted from *Saif Ali* is that such limited immunity extended to pre-trial work (although not covering an advice given by a barrister on the facts of that case). This is necessarily so since a litigation in the court undergo a gestation period and much of the work related to the management of a cause is done in the comfort and privacy of the advocate and solicitor's office. It is not however possible to enumerate an exhaustive list of these pre-trial work. The facts of each case will determine whether such work falls under the narrow 'intimately connected test' in *Rees v Sinclair*. As Lord Diplock puts it in *Saif Ali*:

> It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court.
>
> The work which the barrister in the instant case is charged with having done negligently, viz, in advising as to who was to be a party to an action and settling pleadings in accordance with that advice, was all done out of court. In my view, it manifestly falls outside the limited extension of the immunity which I have just referred to.

In my view this limited immunity should, at common law, be also extended to an advocate and solicitor in our country in his work which is intimately connected with the conduct of the litigation in court.

In Malaysia, statutory protections against civil actions or prosecutions are accorded to the other participants in a court proceeding, also founded on public policy. So for example, a judge and other judicial officers are protected under s 14(1) of the Court of Judicature Act 1964 ('the CJA') in the exercise of their judicial duties. (see the cases *Anthony Ratos v City Specialist* [1996] 3 CLJ 415; *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; and *Ho Kok Thin v Registrar of the High Court* [1989] 3 MLJ 181).

In *Wong Cheong Kai & Ors v Hong Kong & Shanghai Bank & Anor* [1996] 4 CLJ 114 it was held by Kang Hwee Gee J that the protection under s 14(2) of the CJA is accorded to such persons, including an advocate and solicitor exercising his duty as an officer of the court in executing court orders, but such protection does not extend to the manner of such execution and as such an advocate and solicitor may still be found to be

liable for negligent conduct. Witnesses too are protected from any arrest or prosecution when compelled by a court to answer a question (s 132(2) of the Act).

Seemingly, there would be thus instances where the common law would accord the necessary protection to an advocate and solicitor with a limited immunity blanket in the exercise of his function in attending to a cause or proceeding in court. My view is that such an immunity is necessary on public policy considerations having regards to the factors taken into account by the House of Lords in the 's case. These factors may now be summarized as follows:

i) the consideration that a proper administration of justice may not be achieved if barristers are inhibited by the fear of being sued for negligence by a disgruntled client at the expense of exercising the duty he owes to the court;

ii) the public interest consideration in that issues already decided at a trial may have to be relitigated in the ensuing negligence suit between the client and his barrister to establish the negligence and damage flowing;

iii) the existing general immunity attached to all the other participants in proceedings before a court vis judges, court official, witnesses or parties based on public policy to ensure that trials are conducted without the stress and fear on the part of those participants, not for their benefit but in the higher interest of the advancement of justice.

For this case, on the authorities, which command profound respect, I am of the view that the defence of limited immunity is applicable to the defendant and on the facts, I find that the acts complained of as purportedly giving rise to negligence are acts preparatory to and so intimately connected and akin to the actual conduct of the case in the Temerloh suit. The judgment in *Saif Ali* was recently applied in the English Court of Appeal case of *Kelley v Corston* [1998] 3 WLR 246, a case involving a negligence suit by a client against the barrister who had advised the former to settle her claim for ancillary relief in a matrimonial proceeding. The district judge had struck out the action as one disclosing no cause of action since the act of the barrister (in advising and negotiating a settlement at the door of the court) was covered by immunity. It was held, inter alia:

> that, although there was a public interest in defining the areas attracting immunity from suit as narrowly as possible, conduct at the door of the court, while precluding the conduct of the cause in court, was nevertheless intimately connected with it; that negotiations in such circumstances and settlements which resulted from them were an integral part of the conduct of the cause and had the necessary degree of intimate connection with its conduct in court to attract immunity; and that, accordingly, the defendant's conduct in making a settlement at the door of the court when the trial of the merits was about to begin was immune from the plaintiff's claim.

I must quickly add in qualification, that the limited immunity defence succeeded here in view of the particular factual background as founded on

A the evidence adduced before this court. This court maintains the view that an advocate and solicitor who holds himself as possessing reasonable competence in his vocation owes a duty to his client to exercise that duty with reasonable care and competence. Events may turn out to prove that an advocate and solicitor had been wrong in making a decision but this does not mean that he had been negligent. His is only a duty to exercise reasonable care and competence, there is no duty to be right.

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For these reasons, the plaintiff's claim was dismissed with costs.

Appeal with costs allowed.

Reported by Wong Siok Chin

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